Supreme Court, U.S.
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No. 04-1501

IN THE

Supreme Court of the United States

INDEPENDENT INK, INC.,
Cross-Petitioner,

v.

ILLINOIS TOOL WORKS INC. AND TRIDENT, INC.,
Cross-Respondents.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR CROSS-RESPONDENTS IN OPPOSITION

RICHARD J. FAVRETTO
ANDREW J. PINCUS
Counsel of Record
CHRISTOPHER J. KELLY
NICKOLAI G. LEVIN
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Counsel for Cross-Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether the court of appeals correctly affirmed summary judgment on cross-petitioner's theory of antitrust liability under Section 2 of the Sherman Act (15 U.S.C. § 2) on the basis of the district court's finding that cross-petitioner failed to establish a geographic market.

2. Whether the court of appeals erred in remanding the case to allow the district court to apply the new legal standard announced by the court of appeals to the facts of this case, rather than applying that standard itself.

3. Whether the presumption of market power in patent tying cases is irrebutable.

RULE 29.6 STATEMENT AND PARTIES TO THE PROCEEDING

Pursuant to this Court's Rule 29.6, petitioners state that Trident, Inc. was acquired by Illinois Tool Works Inc. on February 17, 1999. Thereafter, Trident, Inc. became a division of ITW, and is no longer a separate corporate entity. Illinois Tool Works Inc. is a publicly held corporation.

The parties to the proceeding in the court of appeals were Illinois Tool Works Inc., Trident, Inc., and Independent Ink, Inc.

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Cross-Petitioner Independent Ink, Inc.'s three-paragraph conclusory argument does not come close to articulating a cognizable reason for granting its conditional cross-petition. The conditional cross-petition therefore should be denied.

Two of the questions presented in the conditional cross-petition are entirely fact-bound. Independent Ink first seeks review of the district court's determination, upheld by the court of appeals, that its theory of antitrust liability under Section 2 of the Sherman Act (15 U.S.C. § 2) was deficient because Independent Ink failed to present sufficient evidence defining a geographic market. 04-1329 Pet. App. 18a, 52a. This Court has consistently recognized that "'[a] court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.'" *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996) (quoting *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)). Independent Ink has not even attempted to make such a showing here, let alone explain why such a factual issue is sufficiently important to warrant this Court's attention. Review plainly is not warranted on this ground. Cf. *NLRB v. Hendricks County Rural Elec. Corp.*, 454 U.S. 170, 176 n.8 (1981) (improvident grant of cross-petition that presented "primarily a question of fact," "which does not merit Court review").

Second, Independent Ink asserts that the court of appeals itself should have applied to the facts of this case its standard for rebutting the market power presumption rather than remanding to allow the district court to make that determination in the first instance. To begin with, Independent Ink's contention rests on the erroneous claim that it is "uncontro-

verted that there are no substitutes for the patented printhead" (04-1501 Pet. 3); in fact, the district court expressly found there are competing substitutes for the patented printhead (04-1329 Pet. App. 22a, 35a-36a), a finding that the court of appeals did not disturb (*id.* 16a).

More fundamentally, the court of appeals' approach is entirely appropriate: this Court frequently directs lower courts to apply in the first instance a newly announced legal standard. See, *e.g.*, *Johnson v. California*, 125 S. Ct. 1141, 1152 (Mar. 30, 2005) (citing cases). There accordingly is no warrant for review of this wholly case-specific issue by this Court.

The final question raised in the conditional cross-petition is whether the Federal Circuit erred in holding that the market power presumption is rebuttable. Independent Ink contends that the presumption is irrebuttable, but presents no reasons at all why review of that issue is warranted other than the fact that this Court has never expressly stated that the presumption is rebuttable. Although there is some disagreement among the courts of appeals with respect to the particulars of how the presumption may be rebutted, no court of appeals has squarely held that the presumption is irrebuttable. See 04-1329 Pet. 24. Nor, contrary to Independent Ink's intimation, does *International Salt Co. v. United States*, 332 U.S. 392 (1947), so hold. There, although the Court presumed the necessary degree of market power from the patent, it never held that the presumption was "irrebutable." Rather, as the Court later explained, *International Salt* viewed a patent as "at least *prima facie* evidence of [market] control." *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 307 (1949); see also 10 P. Areeda et al., *Antitrust Law* ¶¶ 1737b, 1737c, at 80-83 (2d ed. 2004) (describing ambiguities in *International Salt's* holding). The court of appeals' determination that the presumption is rebuttable presents no cause for review.

It is therefore respectfully submitted that the conditional cross-petition should be denied.

RICHARD J. FAVRETTO
ANDREW J. PINCUS
Counsel of Record
CHRISTOPHER J. KELLY
NICKOLAI G. LEVIN
Mayer, Brown, Rowe
& Maw LLP
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Washington, DC 20006
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